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No. 94-1837

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

BARNETT BANK OF MARION COUNTY, N.A.,
Petitioner,

v.

TOM GALLAGHER, INSURANCE COMMISSIONER OF THE STATE OF FLORIDA, FLORIDA DEPARTMENT OF INSURANCE, FLORIDA ASSOCIATION OF LIFE UNDERWRITERS, PROFESSIONAL INSURANCE AGENTS OF FLORIDA, INC., and FLORIDA ASSOCIATION OF INSURANCE AGENTS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONDENTS INSURANCE AGENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — Page

STATUTES

TABLE OF AUTHORITIES—Continued

Page

MISCELLANEOUS

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Respondents Florida Association of Life Underwriters, Professional Insurance Agents of Florida, Inc., and Florida Association of Insurance Agents (collectively, the "Insurance Agents") respectfully respond to Petitioner Barnett Bank of Marion County, N.A.'s (the "Bank's") Petition For A Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this action.

STATEMENT OF THE CASE

The judgment entered by the Eleventh Circuit is correct. Nevertheless, the Eleventh Circuit's decision and the Louisiana state court's final decision in *First Advantage Ins., Inc. v. Comm'r of Ins. St. of Louisiana*, 652 So.2d 562 (La. Ct. App., First Cir. 1995), *cert. denied*, No. 95-C-0820 (La. S. Ct. May 5, 1995), *cert. petition filed* No. 94-2130 (June 27, 1995) ("*First Advantage*"), are squarely in conflict with the judgment entered by the United States Court of Appeals for the Sixth Circuit in *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1994) ("*Owensboro*") (*reprinted in* Petition for a Writ of Certiorari ("Cert. Pet."), Appendix ("Pet. App.") D). Petitions for Writs of Certiorari already have been filed in this case and in *First Advantage*; the Insurance Agents' sister Kentucky associations intend to file a petition for a writ of certiorari in the *Owensboro* case by July 13.[1] The issue is of significant importance to both the banking and insurance industries, and is likely to arise in other States. Indeed, a case is currently pending in a federal district court in Connecticut raising virtually identical issues. *See Shawmut Bank Connecticut, N.A. v. Googins, et al.*, No. 3:94CV146(RNC) (U.S. D.C. D.Conn.).

For the reasons delineated below, the Insurance Agents urge this Court to resolve the conflict by granting the Bank's Petition and reviewing the Eleventh Circuit's judgment in this case.

I. THE ISSUE PRESENTED.

As recognized by the courts and Congress, regulation of the insurance industry in this country has been reserved for the States. At issue in this case is the authority of the Florida Commissioner of Insurance (the "Commissioner") and other state insurance commission-

[1] The Insurance Agents' counsel represent the insurance agent association parties in all three of these cases.

ers around the country to exercise their traditional police power to regulate the sale of insurance. The same fundamental question is at the heart of this case, *Owensboro* and *First Advantage*: Who may regulate insurance activities, including determining which entities may be licensed to sell insurance, in Florida, Kentucky, Louisiana and other States? Is the State Legislature the final determinant, exercising its authority through statutes implemented and enforced by the Commissioner of Insurance? Or can the federal government *sub-silentio* dictate how insurance activities are conducted in each of these States?

Like any other potential insurance agent, banks (and their subsidiaries) are subject to the licensing requirements of state law. A central provision of Florida law, Fla. Stat. 626.988, prohibits all employees of bank holding companies and their subsidiaries, including state and national banks, from selling broad forms of insurance. In enacting this law, the Florida Legislature, as the primary regulator of the business of insurance within the State, was forced to grapple with the difficult consumer protection issues posed by bank sales of insurance. The district court discussed some of these problems at length:

> For example, in order to make a profit on automobile loans or home mortgages, the insurance agents may incur business they might otherwise reject because they would be pressured by the bank to do so in order to consummate the bank's loan transactions. This might lead to the over-insurance of risky business, which could result in the insolvency of the insurer.
>
> Additionally, and notwithstanding the existence of specific prohibitions on coercive credit extension, the Court finds that loan officers could steer customers to the bank's insurance agent for the purpose of suggesting the sale of insurance that is not needed, in order for the bank to make a profit on the insurance policy. The concern herein expressed is that an arms-

> length relationship be maintained among the bank, the loan officer and the insurance agents. The maintenance of this relationship is for the protection of the solvency of the insurance industry, and the prevention of coercion, which in turn protects all potential, present and future policyholders.

Barnett Bank of Marion Co., N.A. v. Gallagher, 839 F. Supp. 835, 842 (M.D. Fla. 1994) (*reprinted in* Pet. App. B at 3a), *aff'd*, 43 F.3d 631 (11th Cir. 1995) (*reprinted in* Pet. App. A). Other States have made the same policy decision to maintain a separation between banking and insurance. As the Bank notes, at least fourteen other States have similar laws restricting banks from being licensed to sell general forms of insurance.[2]

In its Petition for Certiorari, the Bank argues that such licensing prohibitions are pre-empted by Section 13 of the Federal Reserve Act, 12 U.S.C.A. § 92 (1995 Supp.),[3] which otherwise permits a national bank "located and doing business in a place in which the population does not exceed 5,000 inhabitants" to act as an agent in the sale of general forms of insurance. Both the district court and the Eleventh Circuit unanimously disagreed with the Bank. Both courts concluded that Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), dictates that Section 92—a law that regulates the business of national banks—may not be interpreted to supersede or pre-empt Fla. Stat. 626.988—a law "enacted for the purpose of regulating the business of insurance." *See* Pet. App. A & B.

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[2] *See* Cert. Pet. at 6 & n.1.

[3] This provision is commonly known as "Section 92" and will be referred to as such herein. *See United States Nat'l Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 113 S.Ct. 2173 (1993) (discussing the tortured history of this provision).

II. THE McCARRAN-FERGUSON ACT—LEAVING REGULATION OF THE BUSINESS OF INSURANCE TO THE STATES.

The McCarran-Ferguson Act, 15 U.S.C. §§ 1011 *et seq.*, makes clear, as a matter of federal law, that the States are the penultimate authority in the insurance realm unless Congress intentionally and expressly overrides that authority. Section 2(a) of McCarran is explicit:

> The business of insurance, *and every person engaged therein*, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

15 U.S.C. § 1012(a) (emphasis added). McCarran's Section 2(b) further provides:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance.

15 U.S.C. § 1012(b).[4] This law, originally enacted in 1944, did not articulate a new federal policy but instead sought to ensure that the States were permitted to remain the primary regulators of the business of insurance.

Until 1944, it had been universally understood that the States maintained exclusive control over the regulation of insurance. *E.g., United States Dep't of Treasury v. Fabe*, 113 S. Ct. 2202, 2207 (1993); *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 539 (1978). This

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[4] As even the "Declaration of Policy" provision of McCarran clarifies,

> Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that *silence on the part of the Congress shall not be construed to impose any barrier* to the regulation or taxation of such business by the several States.

15 U.S.C. § 1011 (emphasis added).

axiom of state regulation had existed at least since 1869, when the Supreme Court decided *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869). *Paul v. Virginia* involved an appeal by an insurance agent from a fine imposed for selling coverage for a New York insurer that was not properly licensed in Virginia. In disposing of the agent's argument that Virginia licensing laws violated the Commerce Clause of the U.S. Constitution, the Court held that "[i]ssuing a policy of insurance is not a transaction of commerce." *Id.* at 183. Cases following *Paul v. Virginia* held that not only the issuance of a policy, but the entire business of insurance, was *not* commerce regulable by Congress. *E.g., Hooper v. California*, 155 U.S. 648, 649 (1985); *New York Life Ins. Co. v. Deer Lodge County*, 231 U.S. 495, 506 (1913). Consistent with this case law, Congress had repeatedly refused to extend federal authority over the insurance business, concluding that the regulation of the insurance business was beyond Congress' power. *See, e.g.*, Sen. Rep. No. 4406, 59th Cong., 1st Sess. (1906); H.R. Rep. No. 2491, 59th Cong., 1st Sess., 12-25 (1906).

All this changed in 1944 with the United States Supreme Court's decision in *United States v South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), a case cited by the Eleventh Circuit, the *First Advantage* court and the *Owensboro* dissent but, notably, not by the *Owensboro* majority. In upholding a criminal indictment for alleged Sherman Act violations, the Court in *South-Eastern* held, for the first time, that an insurance company was subject to the federal antitrust laws. The decision "naturally, was widely perceived as a threat to state power to tax and regulate the insurance industry." *Fabe*, 113 S. Ct. at 2207. Congress reacted by enacting the McCarran-Ferguson Act. *FTC v. Travelers Health Ass'n*, 362 U.S. 293, 299 (1960). McCarran restored oversight of the insurance industry to the States, except with regard to antitrust issues where a State had failed to act. 15 U.S.C. §§ 1011 *et seq.*

As this Court has explained, McCarran "transformed the legal landscape by overturning the normal rules of pre-emption":

> Ordinarily, a federal law supersedes any inconsistent state law. The first clause of § 2(b) reverses this by imposing what is, in effect, a clear statement rule, *a rule that state laws enacted "for the purpose of regulating the business of insurance" do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise.*

Fabe, 113 S. Ct. at 2211 (emphasis added). Disagreement over the parameters of the first prong of this test —determining whether a state law was enacted "for the purpose of regulating the business of insurance"—has created the conflict this Court must now address.

III. THERE IS A SQUARE CONFLICT ON AN IMPORTANT QUESTION OF FEDERAL LAW.

Every court to consider the question has concluded that Section 92 does not "specifically relate to the business of insurance" under Section 2(b) of McCarran. *See* Pet. App. A at 15a; Pet. App. B at 33a-35a; *Owensboro Nat'l Bank v. Moore*, 803 F. Supp. 24, 36 (E.D. Ky. 1992), *aff'd on other grnds.*, 44 F.3d 388; *First Advantage*, 652 So.2d at 573-74. There is complete uniformity on this point.

The conflict arises regarding the first inquiry under McCarran. The fundamental disagreement between the Louisiana state court and the Eleventh Circuit on the one hand and the Sixth Circuit on the other is whether state laws that exclude banks from being licensed to sell insurance are "enacted for the purpose of regulating the business of insurance." The Eleventh Circuit and the Louisiana state court squarely disagree with the Sixth Circuit both about whether such laws may be enacted for that "purpose" and about the proper test to make this determination.

The *Owensboro* majority, purporting to apply the standards developed by this Court in the course of construing McCarran's *antitrust* clause, *see Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982), flatly held that "[e]xcluding a person from participation in an activity [] is different from regulating the manner in which it is conducted." *Owensboro*, 44 F.3d at 392, Pet. App. D at 49a. Based on this holding, the *Owensboro* majority concluded that *any* state law that prohibits a bank from being licensed to sell insurance *cannot* be a law enacted "for the purpose of regulating the business of insurance" within the meaning of McCarran. *Id.*

The Eleventh Circuit and the *First Advantage* court reached an opposite conclusion through the application of the test developed by this Court in *Fabe*. In *Fabe*, the Court emphasized that the scope of the first clause of Section 2(b) is significantly different from the antitrust clause to which the *Owensboro* majority looked.[5] The general pre-emption clause of McCarran is very broad and encompasses all state laws that have the "end, intention, or aim of adjusting, managing, or controlling the business of insurance." 113 S. Ct. at 2210 (citation omitted). In articulating this standard, the *Fabe* Court relied primarily on the only other Supreme Court decision

[5] The *Fabe* Court specifically distinguished the broad general immunity from pre-emption by *any* federal law conferred in the first clause of Section 2(b), from the much narrower immunity from pre-emption by federal *antitrust* law (*i.e.*, Sherman, Clayton, and Federal Trade Commission Acts) conferred in the Section's second clause. As the *Fabe* Court explained:

> [T]he first clause of § 2(b) was intended to further Congress' primary objective of granting the States *broad* regulatory authority over the business of insurance. The second clause accomplishes Congress' secondary goal, which was to carve out only a *narrow* exemption for "the business of insurance" from the federal antitrust laws.

113 S.Ct. at 2210 (citations omitted) (emphasis added). For this reason, the *Owensboro* majority's reliance on the antitrust test articulated in *Pireno* was inappropriate.

addressing the provision, *SEC v. National Securities, Inc.*, 393 U.S. 453 (1969). The *National Securities* Court had concluded that, at its core, the McCarran exemption broadly encompasses state laws "aimed at protecting or regulating th[e] relationship [between insurer and insured], directly or indirectly." *National Securities*, 393 U.S. at 460. Based on this, the *Fabe* Court held that the Ohio bankruptcy priority statute at issue was "enacted for the purpose of regulating the business of insurance" because it was "designed to further the interests of policyholders." *Fabe*, 113 S. Ct. at 2208, 2212.

Based on the factual record created before the trial court and state court case law interpreting the state law provision, the Eleventh Circuit concluded that Florida's prohibition on bank licensure to sell insurance was enacted "for the purpose of regulating the business of insurance" because "it protects policyholders." Pet. App. A at 13a. From this determination, the Eleventh Circuit concluded that, "'[u]nder the terms of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), therefore, federal law must yield to the extent the [state] statute furthers the interests of policyholders.'" *Id.* (quoting *Fabe*, 113 S. Ct. at 2208).

The *First Advantage* court adopted the Eleventh Circuit's reasoning to conclude that a Louisiana bank insurance licensing prohibition also is protected from pre-emption by McCarran. *See First Advantage*, 652 So.2d at 572-76. In dissent, Circuit Judge Batchelder argued that the *Owensboro* majority should have done the same. *See Owensboro*, 44 F.3d at 394-97 (Batchelder, J., dissenting), Pet. App. D at 50a-64a.

The import of the Sixth Circuit opinion—reached without any meaningful review of the purpose underlying the enactment of the Kentucky provision—is to impose a blanket rule to the effect that such laws cannot be found to have been enacted for such a purpose. The Eleventh Circuit reached a contradictory conclusion only after con-

ducting a complete review of the State of Florida's proffered purposes for enacting its licensing prohibition. The Eleventh Circuit utilized a carefully considered analysis consistent with this Court's precedents and the federal policies embodied in the McCarran-Ferguson Act. The Sixth Circuit did not.

IV. RESOLUTION OF THIS SQUARE CONFLICT IS ESSENTIAL AND THIS CASE PROVIDES THE BEST VEHICLE FOR THAT RESOLUTION.

As noted by the Bank and at the outset of this brief, the laws of at least 15 States preclude national banks from selling insurance under Section 92 absent pre-emption. Unless this Court resolves the conflict, the two States located in the Sixth Circuit that have such laws (Kentucky and Tennessee) appear to be precluded from applying them by *Owensboro*, while the one restrictive State located in the Eleventh Circuit (Florida) and the State of Louisiana will continue to enforce their prohibitions against national bank insurance sales. There is no way to predict whether the other 12 States will be able to continue to enforce their prohibitions against national banks if challenged. A national bank in Connecticut already has initiated yet another action seeking a determination that the Connecticut prohibition on bank sales of insurance, as applied to national banks, is pre-empted by Section 92. *See Shawmut Bank Connecticut, N.A. v. Googins, et al.*, No. 3:94CV146(RNC) (U.S.D.C. D. Conn.). Other challenges will undoubtedly follow.

This Court cannot permit different standards to be applied to national banks in each of these cases merely by virtue of their location in different States,[6] nor can it condone the uncertainty that has been created for both national banks and state insurance commissioners throughout the country by failing to resolve the conflict that now exists.

[6] Or to branches of the same national bank located in different states.

This case provides the best vehicle for the Court to address this conflict for one simple reason: it is the only case in which a record regarding a State's purpose in enacting its licensing prohibition has been developed. It is therefore the only case in which the Court can fully examine the import of McCarran's "purpose" inquiry and adequately evaluate the Sixth Circuit's determination that laws that preclude designated classes of persons or entities from being licensed to sell insurance are not—as a matter of law—enacted for the "purpose of regulating the business of insurance."

CONCLUSION

For the foregoing reasons, the Insurance Agents respectfully urge this Court to grant the Bank's Petition for a Writ of Certiorari.

Respectfully submitted,

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